Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

**Supreme Court of the United States**

October Term, 1996

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SOUTHWEST AIRLINES CO.,

*Petitioner*

v.

PATRICK FENNESSY,

*Respondent.*

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On Petition for Writ of Certiorari from the
United States Court of Appeals for the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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51 pp

## QUESTION PRESENTED FOR REVIEW

Whether a Railway Labor Act system board of adjustment has exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA?

## ALL PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding. Southwest Airlines Co. is a Texas corporation. It has no parent companies, subsidiaries or affiliates that have issued shares to the public.

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IN THE

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PATRICK FENNESSY,

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On Petition for Writ of Certiorari from the
United States Court of Appeals for the Ninth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## Citation of Official Report of Opinion

Sought to be reviewed is a decision of the United States Court of Appeals for the Ninth Circuit, *Fennessy v. Southwest Airlines*, 91 F.3d 1359 (9th Cir. 1996).

## Statement of Basis for Jurisdiction

The Ninth Circuit rendered its decision on August 7, 1996. (App. 1.) Thereafter, Southwest timely filed a combined petition for rehearing and suggestion for rehearing en banc which was denied by the Ninth Circuit by order dated December 6, 1996. (App. 3.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a

writ of certiorari the judgment or decree of the Ninth Circuit.

## Statutes Involved in the Case

Relevant provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* are set forth in the Appendix. (App. 4.)

## Statement of the Case

Patrick Fennessy claims that Southwest Airlines Co. violated section 152, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his efforts to replace his existing union with a different one. The district court granted summary judgment for Southwest, concluding that Fennessy's exclusive remedy was through the system board of adjustment. (App. 2.) The Ninth Circuit reversed. (App. 1.)

Fennessy was employed by Southwest as a ramp agent. While driving a baggage cart, he struck an aircraft, resulting in damage to the aircraft and a delay of the flight until it could be determined whether the aircraft was airworthy. Thereafter, Southwest conducted a factfinding session which resulted in the termination of Fennessy's employment. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest policy. (App. 1.2.)

Fennessy was a member of the Ramp Operations and Provisioning Agents ("ROPA"), as required by the collective bargaining agreement between Southwest and ROPA. ROPA has been the recognized collective bargaining representative

for Southwest ramp agents since 1988.[1] Following the accident, Fennessy sought and obtained the assistance of the ROPA representative. Upon his termination, Fennessy filed a grievance through ROPA and the matter proceeded to a hearing before a system board of adjustment, consisting of two members of Southwest's management and two ROPA members. The system board of adjustment upheld Fennessy's termination. (App. 1.2.)

Fennessy did not seek judicial review of the system board decision. Rather, he filed the present action in the United States District Court for the Central District of California, alleging that Southwest violated 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his having engaged in activities to replace ROPA with the Teamsters union. In the district court, Fennessy made no claim that ROPA did not fairly represent him in the system board hearing. He raised that issue for the first time on appeal to the Ninth Circuit. (App. 1.2-3.)

## Argument and Authority

### *Error of the Ninth Circuit*

In reversing the district court, the Ninth Circuit concluded that Fennessy had a judicially cognizable cause of action under section 152, Fourth, and that he was not required to submit that statutory claim to the system board of adjustment. The Ninth Circuit fell into error in several respects. First, it placed undue reliance upon this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___,

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[1] In late 1996, ROPA merged with the Transport Workers Union of America, AFL-CIO. The entity formerly known as ROPA is now TWU Local 555.

114 S. Ct. 2239 (1994). The *Norris* decision was limited to the issue of whether an employee's state cause of action is *preempted* by the RLA. It did not involve the issue of the appropriate forum for resolving an individual employee's claim of a statutory violation of the RLA. Second, the Ninth Circuit failed to give proper deference to the strong federal labor policy favoring submission of employee disputes to the arbitral tribunals mandated by the RLA.

*Important Question of Federal Law Which Has Not, But Should Be, Settled by this Court*

Prior to 1934, arbitration procedures contained in the RLA were voluntary. They proved to be ineffective. Consequently, in 1934 the RLA was amended to provide for a dispute resolution procedure which is "mandatory, exclusive, and comprehensive." *Brotherhood of Locomotive Eng'rs v. Louisville & N.R.R.*, 373 U.S. 33, 36-38, 83 S. Ct. 1059, 1061-62 (1963). "The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 94, 99 S. Ct. 399, 402 (1978) (*per curiam*).

Using the traditional definition of minor dispute, this Court in *Norris* held that an employee's state law claim was not preempted by the RLA because the source of the claim existed independently of the collective bargaining agreement. 114 S. Ct. at 2245-49. *See also Atchison, T. & S.F.R.R. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410 (1987) (RLA employee may pursue judicial remedies under the Federal

Employers' Liability Act, 45 U.S.C. § 51 *et seq.*). Left unanswered by the *Norris* and *Buell* decisions is the question of whether an individual employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA must be submitted initially to the statutorily created adjustment board.

### *Traditional Minor Dispute Analysis As Applied in Norris Is Inadequate to Statutory Claim Presently Before the Court*

This Court has repeatedly defined "major" and "minor" disputes under the Act. Briefly, major disputes are those arising from the negotiation of new collective bargaining agreements or the renegotiation of existing agreements. Minor disputes are those arising from the interpretation and application of existing collective bargaining agreements. *Elgin, J.& E. Ry. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1290 (1945); *Consolidated Rail Corp. v. Railway Labor Exec's Ass'n*, 491 U.S. 299, 302, 109 S. Ct. 2477, 2480 (1989). Minor disputes have been described as "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen v. Chicago R.& I.R. Co.*, 353 U.S. 30, 33, 77 S. Ct. 635, 637 (1957). In other words, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U.S. at 302, 109 S.Ct. at 2480, citing *Burley*, 325 U.S. at 723, 65 S. Ct. at 1289-90.

However, the Court's traditional minor dispute analysis as applied in *Norris* is inadequate when applied to the statutory claim presently before the Court. First, the Court in *Norris* took too restrictive a view of the nature of collective bargaining agreements when it concluded that a

run-of-the-mill discharge case presents nothing more than "'purely factual questions' about an employee's conduct or an employer's conduct and motives [which] do not 'requir[e] a court to interpret any term of a collective bargaining agreement .'" *Norris*, 114 S. Ct. at 2248, quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S. Ct. 1877, 1882 (1988). For as this Court has repeatedly stated: "A collective bargaining agreement is not an ordinary contract . . . . 'The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular plant'" *Transportation Union v. Union Pac. R.R.*, 385 U.S. 157, 160-61, 87 S. Ct. 369, 371 (1966), quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-79, 80 S. Ct. 1347, 1350-51 (1960). Moreover, in the case presently before the Court, the statutory protection at issue is incorporated, by statute, into every RLA collective bargaining agreement. Specifically, under the RLA, the rights under section 152, Fourth are incorporated by statute into every collective bargaining agreement. 45 U.S.C. § 152, Eighth.

Additionally, the minor dispute analysis as applied in *Norris* fails to consider that even purely statutory claims may be appropriate for resolution in arbitral tribunals. As in the case presently before the Court, where a discharged employee makes a statutory claim, and where an RLA collective bargaining agreement broadly provides for the submission of all discharge cases to the statutorily mandated adjustment board, this Court should look beyond its traditional minor dispute analysis and carefully examine the source of any claimed statutory right to determine whether "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

473 U.S. 614, 628, 105 S. Ct. 3346, 3354-55 (1985). The burden should be on the employee "to show that Congress intended to preclude a waiver of a judicial forum" for his RLA claim. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). "If such an intention exists, it will be discoverable in the text of the [RLA], its legislative history, or an 'inherent conflict' between arbitration and the [RLA's] underlying purposes." *Id.* While conducting this analysis, the Court should bear in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). (Although *Moses H. Cone* involved the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, it cannot be seriously maintained that the FAA evinces a stronger federal policy favoring arbitration than that *mandated* by the RLA.) By requiring an employee to first submit his statutory discharge claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

*Function and Relationship of*
*System Boards of Adjustment and Federal Courts*

Federal courts, in the exercise of their equity jurisdiction, possess the authority to compel compliance with the duties and obligations of the Railway Labor Act. *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 57 S. Ct. 592 (1937). However, as the Court later explained, "we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the

Railway Labor Act.'" *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 441, 109 S. Ct. 1225, 1234-35 (1989), quoting *Switchmen's v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S. Ct. 95, 96 (1943).

Consistent with this principle, it is understandable that where there has not yet been established a system board of adjustment, it is appropriate for the federal courts to entertain suits by individual employees to enforce their rights under section 152, Fourth.[2] *See, e.g., Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970). "To hold, in this case, that Burke may not bring suit for a violation of section 2 (Fourth) would leave a gap in the enforcement of that section which would blunt the effectiveness of the congressional purpose." *Id.* at 1033. *See also Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984) (jurisdiction in federal court not contested where no collective bargaining agreement existed, and carrier declined to entertain grievance in the absence of a collective bargaining agreement).

Additionally, of course, even where a system board has been established, judicial intervention may be necessary in order to preserve the integrity and jurisdiction of the board. *Brotherhood of R.R. Trainmen*, 353 U.S. 30, 77 S. Ct. 635; *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry.*, 363 U.S. 528, 80 S. Ct. 1326 (1960). Similarly, if the employee is arbitrarily and discriminatorily denied access to the system board, obviously, he should be permitted to

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[2] "Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. From the time of our very first opportunity to interpret the 1934 amendments, we have viewed them as addressing primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines*, 489 U.S. at 440, 109 S. Ct. at 1234.

proceed to federal court. *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903 (1967).

But where, as here, there exists a contractual system board of adjustment as required by the RLA; the relevant collective bargaining agreement provides for the submission of all discharge cases to the system board; the employee invokes jurisdiction of the system board and fully participates in that hearing; the union represents the employee in the grievance procedure and before the system board; there is no evidence of actual bias or impropriety; the employee makes no claim that the union breached its duty of fair representation until the case is pending on appeal before the Ninth Circuit; and the system board sustains the employee's discharge, there is no reason in either logic or the statute which would permit the employee to proceed to federal court, not for the purpose of seeking review of the adjustment board decision, but to claim, belatedly and for the first time, that his discharge was in violation of section 152, Fourth. This is *not* a case where "'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'" *Trans World Airlines*, 489 U.S. at 441, 109 S. Ct. at 1235, quoting *Switchmen's*, 320 U.S. at 300, 64 S. Ct. at 96.

*Competence of System Boards*

The Court's observation in *Norris* and in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-57, 94 S. Ct. 1011, 1022-24 (1974) that questions of statutory construction and application are beyond the experience and authority of labor arbitral tribunals is factually disputable and manifests a continuing "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to

would-be complainants" and, as such, is "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30, 111 S. Ct. at 1654. Indeed, one need look no further than footnote 21 in *Gardner-Denver* to find a judicial acknowledgment that labor arbitrators routinely consider and apply statutory rights:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII,[3] the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.

*Gardner-Denver*, 415 U.S. at 60 n. 21, 94 S. Ct. at 1025 n. 21. Similarly:

> An increasing number of arbitrators have relied on Title VII doctrine to decide their cases, especially where the agreement explicitly stated that the parties would comply with the anti-discrimination law.
>
> If a nondiscrimination clause existed in the agreement, arbitrators have construed this to require their

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[3] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Significantly, after *Gardner-Denver*, Congress encouraged alternative dispute resolution, including arbitration, to resolve Title VII disputes. *See* section 118 of Pub. L. 102-166, set out as a note under 42 U.S.C. §§ 1981, 1981a, 2000e and 2000e-4.

> consideration of Title VII. If the agreement contained no mention of antidiscrimination, arbitrators have continued to recognize that the concepts of just cause and unlawful discrimination are now merged.

Elkouri & Elkouri, *How Arbitration Works*, 4th ed., 1985-89 Cumulative Supplement, pp. 107-08.

Moreover, of particular significance to the case *sub judice*, section 152, Fourth is by statute made a part of every collective bargaining agreement. 45 U.S.C. § 152, Eighth. Consequently, whenever there is an allegation that an employee has suffered discipline because of union activity, the arbitral tribunal is required by law to interpret and apply the statutory provision as if it were part of the collective bargaining agreement. *Texas Int'l Airlines, Inc.*, 68 L.A. 244 (Gruenberg, 1976).

Finally, although the RLA provides for an equal number of union and management representatives on system boards of adjustment, 45 U.S.C. § 153, bias should not be presumed solely because the aggrieved employee is claiming discrimination because of activities antithetical to the incumbent union. For notwithstanding the origin of their appointment, all system board members are "charged with the responsibility of impartially deciding the case before the Board." *Wells v. Southern Airways, Inc.*, 517 F.2d 132, 134 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); 616 F.2d 107 (5th Cir. 1980) (system board, which included union members who had participated in strike, held competent to hear non-union strike breaker's claims of retaliation, collusion and discrimination--absent evidence of actual bias, bias would not be presumed).

*Statutory and Judicial Safeguards*

The system board of adjustment is an appropriate forum for resolving an employee's claim under section 152, Fourth, and sufficient statutory and judicial safeguards exist to protect a claimant's rights. More particularly:

(1) By statute, section 152, Fourth, is made a part of every RLA collective bargaining agreement. 45 U.S.C. § 152, Eighth.

(2) By requiring an employee to first submit his statutory discharge claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

(3) Union/management composition of system boards is contemplated by the RLA, and each board member is charged with the responsibility for exercising his duties in an unbiased and nondiscriminatory manner, even where the claimant is by union affiliation or non-affiliation "institutionally" adverse. *Wells*, 517 F.2d 132, 616 F.2d 107.

(4) If a claimant establishes that any board member is actually biased the board decision may be set aside. *Id.* Similar to the duty of fair representation imposed upon a statutory bargaining representative, a system board of adjustment, as a statutory tribunal, should be "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686 (1953).

(5) An employee claimant has the statutory right of judicial review of any system board decision. 45 U.S.C. § 153, First (q).

(6) A union has a duty of fair representation and may not handle an employee's claim in a manner which is arbitrary, discriminatory or in bad faith. *Vaca*, 386 U.S. at 190, 87 S. Ct. at 916. If the union's breach of its duty results in an inadequate presentation of the employee's claim, the board decision may be set aside. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976).

*Conclusion*

In deciding whether an employee's claim of wrongful discharge in violation of section 152, Fourth must be submitted initially to a system board of adjustment, this Court should not limit itself to its traditional minor dispute analysis. For although section 152, Fourth is by statute made a part of each collective bargaining agreement; and although virtually every wrongful discharge case will require interpretation and application of the collective bargaining agreement in its broader sense, *i.e.* the written agreement as well as the common law of the shop, the Court should also consider whether Congress has manifested an intention to preclude a waiver of judicial remedies for the statutory right at issue. The burden should be on the employee to establish such a congressional intention from the text of the statute, its legislative history or by demonstrating that there is an inherent conflict between arbitration and the RLA's underlying purposes. While conducting this analysis, the Court should bear in mind that questions of arbitrability must

be addressed with a healthy regard for the federal policy favoring arbitration.

The text of the RLA and its legislative history evince an indisputable congressional intent to require carriers and employee representatives to resolve employee disputes within the framework of the statutorily created dispute resolution tribunals. The RLA requires carriers and unions to establish system boards of adjustment to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers. Congress considered it essential to keep these disputes within the adjustment boards and out of the courts. Judicial intervention should be limited to those cases where but for the general jurisdiction of the federal courts, there would be no adequate remedy to enforce the employee's statutory right. Consistent with this congressional intent, a system board of adjustment must have exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA. Restated more simply, the system is in place. Let it work.

In the case presently before the Court, there existed a statutory system board which possessed the experience and authority to enforce the provisions of section 152, Fourth. Consistent with federal policy favoring arbitration of statutory claims, Fennessy should have submitted his statutory claim initially to the system board.

This is an important question of federal law which has not been, but should be, settled by this Court. Consequently, Petitioner prays the Court to grant its petition

for writ of certiorari and to settle this important question of federal law as urged by Petitioner.

Respectfully submitted,

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# APPENDIX

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App. 4 Relevant Provisions of the Railway Labor Act

**Patrick FENNESSY, Plaintiff-Appellant,**

**v.**

**SOUTHWEST AIRLINES,**
**Defendant-Appellee.**

**No. 94-55630.**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 13, 1995.
Decided Aug. 7, 1996.

Appeal from the United States District Court for the Central District of California, Richard A. Gadbois, Jr., District Judge, Presiding. D.C. No. CV-93-02820-RG.

Before: FLETCHER, CANBY, and HAWKINS, Circuit Judges.

CANBY, Circuit Judge:

Patrick Fennessy claims that Southwest Airlines Co. violated section 152, Fourth of the Railway Labor Act ("RLA" or "the Act"), 45 U.S.C. §§ 152-188, by terminating his employment in retaliation for his efforts to replace his existing union with a different one. Fennessy appeals the district court's grant of summary judgment in favor of Southwest. We reverse.

I.

While employed as a ramp agent for Southwest, Fennessy became a member of the Ramp Operations & Provisioning Agents ("ROPA"), as required by the parties' Collective Bargaining Agreement. ROPA has been the recognized collective bargaining representative for Southwest ramp agents since 1988. Asserting that he was dissatisfied with ROPA's representation, Fennessy unsuccessfully engaged in efforts to organize support for representation by the Teamsters Union.

While driving a baggage cart as part of his duties as a ramp agent for Southwest, Fennessy struck an aircraft, causing a superficial 18-inch scratch on the plane's surface and a brief delay before a take-off. Southwest subsequently held a factfinding session concerning that accident, after which Fennessy's employment was terminated. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest's policy.

Following the accident, Fennessy sought and obtained the assistance of the ROPA representative. Upon completion of Southwest's factfinding session, Fennessy filed a grievance through ROPA concerning his termination. After a hearing, a Systems Board of Adjustment, consisting of two members of Southwest's management and two ROPA members, upheld Fennessy's termination.

Fennessy then brought this action in district court, alleging that Southwest violated 45 U.S.C. § 152, Fourth, by terminating his employment in retaliation for his having engaged in activities to replace ROPA with a Teamsters representative. On appeal, Fennessy also contends that

ROPA did not fairly represent him in the Adjustment Board hearing.

II.

Congress adopted the RLA to provide "a comprehensive framework for the resolution of labor disputes in the railroad industry." *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562-63, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987).[1] The Act's coverage has been extended to airlines. 45 U.S.C. § 181. The Act sets forth procedures for dealing with both "major" and "minor" disputes. Major disputes are those arising "'out of the formation or change of collective [bargaining] agreements covering rates of pay, rules, or working conditions.'" *Buell*, 480 U.S. at 562-63, 107 S.Ct. at 1414 (internal quotations omitted) (citation omitted.). Minor disputes "grow [ ] out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Id.* at 563, 107 S.Ct. at 1414 (quoting 45 U.S.C. § 153 First (i)) (internal quotes omitted); *see also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n ("Conrail")*, 491 U.S. 299, 302-04, 109 S.Ct. 2477, 2480-81, 105 L.Ed.2d 250 (1989) (distinguishing between major and minor disputes). The parties agree that Fennessy's claim is not a major dispute.

The parties disagree, however, as to whether Fennessy's discharge involves a minor dispute. The answer depends upon how the dispute over the discharge is framed. The grievance that Fennessy submitted, through ROPA, to the

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[1] We review a grant of summary judgment *de novo*, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

Adjustment Board unquestionably was a minor dispute. The issue was whether Fennessy's termination was based on proper cause within the meaning of the collective bargaining agreement. *See Conrail*, 491 U.S. at 307, 109 S.Ct. at 2483 ("[D]ispute is minor if the action is arguably justified by the terms of the parties' collective bargaining agreement."); *see also Hawaiian Airlines, Inc. v. Norris*, ___U.S.___, ___, 114 S.Ct. 2239, 2245, 129 L.Ed.2d 203 (1994). No claim was raised in these proceedings, or asserted by Fennessy at the time, that his discharge was in retaliation for his organizing activities.

The Adjustment Board's decision is binding on Fennessy with regard to what it decided: that his discharge did not violate the collective bargaining agreement. Judicial review of the Adjustment Board's decision of such a minor dispute is "among the narrowest known to the law." *Buell*, 480 U.S. at 563, 107 S.Ct. at 1414 (internal quotations omitted) (citation omitted). The Board's findings and order may only be set aside for a failure of the Board to comply with procedural or jurisdictional requirements of the Act, for fraud, or for corruption. 45 U.S.C. § 153, First(q).

Fennessy did not seek review of the Board's decision, however. Instead, he brought this action in district court, alleging that his discharge was in retaliation for his Teamster organizing activities and that it accordingly gave rise to an independent statutory claim under 45 U.S.C. § 152, Fourth. Section 152, Fourth provides:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor

> organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

45 U.S.C. § 152, Fourth. Fennessy argues that Southwest Airlines terminated him in order to interfere with his right to organize the labor organization of his choice. Fennessy contends that, because his claim is based on a statutory provision rather than on the collective bargaining contract, it is not a minor dispute that must be brought to a Board of Adjustment; it is a statutory claim that he may bring directly in district court.

Fennessy is correct. If there was any doubt before whether a statutory claim could constitute a minor dispute, it was dispelled by *Hawaiian Airlines v. Norris*, __U.S.___, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994). *Norris*, which was decided after the district court ruled in this case, involved a question whether state-law claims of discharge in violation of public policy and discharge in violation of a "whistleblowers' protection" statute were preempted by the RLA. The discharged worker had unsuccessfully grieved his discharge under the adjustment process, and then had sued in state court. In holding the claims not preempted, the Supreme Court first had to address the question whether the claims were "minor disputes" that were subject exclusively to the RLA grievance process, which would preempt state law. It expressly rejected the defendants' argument that "'grievances' should be read to mean all employment-related disputes, including those based on statutory or common law." *Id.* at ___, 114 S.Ct. at 2244. Instead, the Court held that "the category of minor disputes contemplated by § 151a are those that are grounded in the collective bargaining

agreement." *Id.* at __, 114 S.Ct. at 2245; *see also Conrail*, 491 U.S. at 307, 109 S.Ct. at 2482-83. Accordingly, "the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA." *Norris*, __ U.S. at __, 114 S.Ct. at 2246. Thus the mere fact that Fennessy's discharge could be grieved on contractual grounds under the CBA does not mean that his statutory claim under the RLA is a minor dispute.

The fact that Fennessy's claim is not a minor dispute does not ensure his success on this appeal, however. *Norris* is distinguishable from this case, because it dealt with common-law or statutory claims arising wholly apart from the RLA. Here, Fennessy attempts to assert a private right of action under section 152, Fourth of the RLA. Wholly apart from the "minor dispute" issue, his ability to avail himself of that remedy depends upon the reach of section 152, Fourth and whether it extends to the circumstances of Fennessy's case.

Section 152, Fourth has been viewed "as addressing primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 440, 109 S.Ct. 1225, 1234, 103 L.Ed.2d 456 (1989). The reason is that, once a bargaining representative is certified, the RLA dispute-resolution system is put in place and judicial intervention is generally unnecessary and undesirable. *Id.* at 441, 109 S.Ct. at 1234-35. For this reason, the district court concluded that section 152, Fourth offered no private right of action to Fennessy, because a union had been certified to represent him and the grievance procedure was available and utilized.

The difficulty with this view is that the grievance procedure is designed, as *Norris* indicates, to deal with *contractual* issues arising under the collective bargaining agreement. *Norris,* ___U.S. at ___, 114 S.Ct. at 2245. If Fennessy's statutory rights have been violated, the fact that ROPA may represent him before the Adjustment Board does nothing to remedy that problem. Judicial recognition of his cause of action would therefore seem to be one of "those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'" *Trans World Airlines,* 489 U.S. at 441, 109 S.Ct. at 1235 (quoting *Switchmen's v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S.Ct. 95, 96-97, 88 L.Ed. 61 (1943)).

Southwest contends, however, that recognition of a private right of action for employees who have a bargaining representative will utterly defeat Congress's intent in the RLA "to keep railroad labor disputes *out of the courts.*" *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1289 (9th Cir.1986). For this reason, Southwest argues, the cases that recognize a private right of action either are limited to claims brought by employees prior to certification of a collective bargaining representative, or depend upon a violation of the right of fair representation that distorted the grievance process.

Our reading of the cases does not bear out Southwest's contention. It is quite true that some courts have expressed considerable uneasiness in recognizing a private right of action for employees who have a bargaining representative. Perhaps most explicit is *International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700 (3rd Cir.1982). There a union sued an airline for several disciplinary actions

that it contended were designed to undermine the union's representation. The disciplinary actions were initially grieved. The Third Circuit discussed the precertification emphasis of section 152, Fourth, and stated that it found a lack of authority for entertaining an action under that statute when a collective bargaining agreement was in existence. *Id.* at 709. It added, however: "We do not foreclose the possibility that given the appropriate case and the appropriate circumstances such an action could be brought in federal court." *Id.* Moreover, the court denied the right of action only because the employer's affidavits denying anti-union motivation went uncontroverted. *Id.* at 710-12.

Our seminal decision under section 152, Fourth was *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir.1970). *Burke* involved a claim where the grievance procedure was unavailable, and we made some point of that fact:

> [Burke] was discharged [from his employment] before he was able to extend union coverage to his unit. Thus he is not a member of the union, and the union has no duty or desire to represent him. If Burke cannot sue to enforce the Act, no one can. Such a result is inconsistent with Congress' concern that [§ 152, Fourth] be backed by adequate penalties and could not have been intended.

*Id.*

We relied on no such rationale, however, when later we entertained an action under section 152, Fourth in *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir.1987). In that case, we permitted union pilots returning to work after the conclusion of a strike to seek to enjoin polygraph examinations that they alleged were imposed as anti-union

discrimination. We stated that "[a]n implied right of action exists under this section." *Id.* at 936; *see also Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir.1987) (citing *Arcamuzi* for proposition that "[t]his circuit has held that an implied private right of action exists under RLA [§ 152, Fourth]."), *cert. denied*, 486 U.S. 1006, 108 S.Ct. 1732, 100 L.Ed.2d 196 (1988). We did not discuss whether a certified bargaining representative existed or whether a grievance procedure was in place; we simply applied the statute.

Other cases relied upon by Southwest also do not appear to depend upon an absence of a collective bargaining representative. In *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir.1983), the First Circuit upheld a private right of action for an inspector who was discharged because he sought to organize the inspectors. No bargaining representative appears to have been certified, but the First Circuit did not mention that point. In rejecting the employer's contention that section 152, Fourth was only enforceable by criminal proceedings, the court simply noted that every court that had considered the question had found an implied right of action under section 152, Fourth. *Id.* at 924.[2]

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[2] Because we believe the outcome of this appeal is controlled by cases in which we have previously recognized a private right of action under § 152, Fourth of the RLA, we do not analyze Fennessy's assertion of a private right of action under the standards enunciated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Cf. Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983) (applying *Cort* to question of whether plaintiff could maintain a private right of action under the RLA § 152, Fourth). We recognized a private right of action under § 152, Fourth before *Cort*, *see Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031, 1033-34 (9th Cir.1970), and have followed our holding in *Burke* after *Cort*, *see, e.g., Arcamuzi v. Continental Air Lines Inc.*, 819 F.2d 935, 936 (9th Cir.1987) (citing

We find the same phenomenon when we examine the post-certification cases that Southwest asserts are dependent upon a finding of a violation of the duty of fair representation. In *Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir.1984), an operations agent sued the airline under section 152, Fourth. He had attempted without success to organize the agents under the Teamsters. The airline recognized a competing union, and three days later fired the agent. He grieved his discharge through the new union without success. He then sued the airline and added an unfair representation claim against the new union. The Fifth Circuit held that the agent was entitled to a jury trial on his unfair representation claim, and with regard to the statutory claim noted:

> The parties do not question whether the plaintiff has a private right of action for wrongful discharge under the Railway Labor Act. Therefore we assume without deciding that plaintiff has properly stated a claim. Furthermore, there seems to be no doubt that this claim, which rests not upon a collective bargaining contract, but upon a charge that Southwest violated the statute, was within the jurisdiction of the district court rather than an adjustment board.

*Id.* at 220 n. 2 (internal citations omitted). No mention was made of the necessity for an unfair representation claim to accompany the section 152, Fourth claim.

Similarly, in *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir.1974), the Seventh Circuit entertained a claim

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*Burke* for proposition that "[a]n implied right of action exists under [§ 152, Fourth of the RLA]."). *See generally Stepanischen*, 722 F.2d at 925-27 (concluding that our reasoning in *Burke* survived *Cort*).

under section 152, Fourth of a probationary pilot who had been dischaRged. The union had refused to grieve his discharge, and he added a claim against it for violation of the duty of fair representation. The court of appeals held that the pilot had raised a triable issue of fact on his section 152, Fourth claim, but *had not* raised a triable issue against the union for violation of the duty of fair representation. *Id.* at 917-19. *Conrad* accordingly cannot be said to depend on a requirement of a fair representation violation; quite the contrary, it demonstrates that a triable statutory claim can be brought in the absence of such a violation.

There is a common-sense reason why these cases do not depend on a violation of the right of fair representation in order for an employee to maintain a private action under section 152, Fourth. Because the Board of Adjustment has no jurisdiction over the statutory claim, fair representation in the grievance proceeding is of no use to the statutory-claim plaintiff.

It is fortunate for Fennessy that a viable fair representation claim is not a requisite for maintenance of a private action under section 152, Fourth. Fennessy did not raise an unfair representation argument until he reached this court. He pleaded no claim of violation of the right of fair representation, and he laid no evidentiary groundwork in the district court to support such a claim. Consequently, no unfair representation claim is properly before us.

III.

In summary, we conclude that Fennessy has a private right of action under section 152, Fourth, and that his statutory claim is not a minor dispute. The district court, acting without the benefit of the Supreme Court's recent

decision in *Norris*, erred in ruling to the contrary. We therefore reverse its judgment and remand for further appropriate proceedings. We decline to rule on other issues not reached by the district court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| PATRICK FENNESSY, | ) | |
| | ) | |
| Plaintiff, | ) | CASE NO. CV 93-2820 RG (Sx) |
| v. | ) | |
| | ) | |
| SOUTHWEST AIRLINES CO., et al. | ) | ORDER* |
| | ) | |
| Defendants. | ) | |
| | ) | |

Defendant Southwest Airlines Co.'s ("Southwest") Motion for Summary Judgment came on for hearing before this Court on Monday, March 28, 1994, at 10:00 a.m. Having considered the moving and opposition papers and arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law:

I. Introduction

Plaintiff Patrick Fennessy ("Fennessy" or "plaintiff") was employed as a ramp agent for defendant Southwest Airlines Co. ("Southwest") at Southwest's Burbank station from March 1990 through December 1992. As required by the parties' collective bargaining agreement, Fennessy became a member of the Ramp Operations and Provisioning Agents ("ROPA") following his date of employment with Southwest. Jim Chancellor Decl. ¶ 2; Fennessy Depo. p. 46, 1.24 - p.

* Filed March 28, 1994, Clerk, U.S. District Court, Central District of California; entered March 30, 1994, Clerk, U.S. District Court, Central District of California.

47, 1.10. ROPA has been the recognized collective bargaining unit for Southwest Ramp agents since 1988. Jim Chancellor (Ground Operations Dept. Director) Decl. ¶ 2.

On December 4, 1992, while carrying out his duties as a ramp agent for Southwest, Fennessy struck an aircraft while driving a baggage cart, causing a superficial 18" scratch on the plane's surface and a brief delay before take-off.

On December 7, 1992, Southwest held a fact-finding session at the Burbank station concerning the December 4 accident, after which Fennessy's employment was terminated. The stated reason for Fennessy's termination was his striking the aircraft and failing to report it in accordance with Southwest policy.

At the time of the December 4 accident, plaintiff sought and obtained the assistance of the ROPA representative at the Burbank station in connection with the December 7 fact-finding meeting. Fennessy then filed a grievance concerning his termination through ROPA. On January 25, 1993, a Systems Board of Adjustment hearing was held regarding Fennessy's termination. The Systems Board, consisting of two members of defendant's management and two ROPA members, upheld Fennessy's termination.

II. Plaintiff's Claim for Wrongful Discharge is a "Minor Dispute" under the Railway Labor Act, and this Court Therefore Lacks Jurisdiction to Decide It.

The congressional policy behind the RLA was to promote stability in labor-management relations by "provid[ing] a comprehensive framework for the resolution of labor disputes in the railroad industry." Edelman v.

Western Airlines, Inc., 892 F.2d 839, 842-43 (9th Cir. 1989) (quoting Atchison, Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557, 562 (1987) ("Buell")). This framework was to provide for the resolution of disputes "growing out of grievances or out of . . . agreements covering rates of pay, rules, or working conditions," 45 U.S.C. § 151a, outside the courts. Lewy v. Southern Pacific Transportation Co., 799 F.2d 1281, 1289 (9th Cir. 1986) ("Congress specifically intended the RLA to keep railroad labor disputes out of the courts."). The RLA's coverage is extended to airlines as well as railroads in Title II of the RLA. 45 U.S.C. § 181.

A. What is a "Minor Dispute?"

Disputes which "grow[] out of grievances" are considered "minor disputes," Buell, 480 U.S. at 563, and are dealt with by a specific procedure provided for in section 184 of the RLA. Initially, these disputes must be dealt with through an airline's internal dispute resolution processes, and if not settled there, may be submitted to a Board of Adjustment, which is a statutorily created body with jurisdiction over such claims. 45 U.S.C. § 184.

Generally, a party who has litigated an issue before the board of adjustment on the merits may not relitigate that issue in an independent judicial proceeding. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 325 (1972). An aggrieved party may seek review in the courts **only** for the board's failure to follow the procedures provided for in the RLA or for fraud or corruption of a board member. 45 U.S.C. § 153(q).

B. Ninth Circuit Law

The Ninth Circuit has classified wrongful discharge claims, such as the one at bar, as "minor disputes" subject to the exclusive jurisdictional provisions of section 184. Magnuson v. Burlington Northern Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978); Lewy v. Southern Pacific Transportation Co., 799 F.2d 1281 (9th Cir. 1986); Croston v. Burlington Northern Railroad Co., 999 F.2d 381 (9th Cir. 1993). See also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 105 L.Ed.2d 250, 261 (1989) ("major disputes seek to create contractual rights, minor disputes to enforce them"); Hirras v. Nat'l Railroad Passenger Corp., 10 F.3d 1142, 1145 (5th Cir. 1994) (minor disputes include any claims "founded upon some incident of the employment relationship" even independent of the collective bargaining agreement).

In sum, as plaintiff herein is seeking redress for harm suffered as a result of his discharge from Southwest, and his employment relationship is governed by the ROPA agreement, this Court considers his claim a "minor dispute" subject to the provisions of section 184 of the RLA. Because this claim has already been considered by the board of adjustment, and plaintiff does not allege any procedural improprieties with that process, this Court lacks jurisdiction to consider the merits of plaintiff's claim.

C. Plaintiff's Counterargument

Plaintiff, however, disputes that his claim is a "minor dispute" subject to the exclusive jurisdiction of the board of adjustment. For support, plaintiff relies primarily on the Tenth Circuit's decision in Davies v. American Airlines,

Inc., 971 F.2d 463 (10th Cir. 1992), cert. denied, 124 L. Ed. 2d 657 (10th Cir. 1992).

In Davies, the "gravamen" of plaintiff's action was that his employer's primary motivation in firing him, regardless of any "just cause", was to stop his unionizing activity. Id. at 466. The Davies court adopted a position contrary to that of this circuit, namely that Davies' action did not require interpretation of a collective bargaining agreement and was thus not preempted by the RLA. The Davies court extended the holding of Lingle v. Magic Chef, 486 U.S. 399 (1988), a case involving a retaliatory discharge claim under the Labor Management Relations Act ("LMRA")[1], to RLA claims.

However, the Ninth Circuit had previously refused to make the same extension of Lingle, and distinguished Lingle as applying to LMRA cases, not RLA cases. See Grote v. Trans World Airlines, Inc., 905 F.2d 1307 (9th Cir.), cert. denied, 498 U.S. 958 (1990) ("[t]he preemption created under the RLA and that arising under § 301 of the LMRA are not analogous. . . . [B]ecause the RLA's preemptive force appears on the face of the statute and § 301 preemption is judicially imposed, we conclude that preemption under the RLA is broader than under § 301."). Since Davies is not the law of this circuit, plaintiff's argument must fail and his claim deemed a "minor dispute" subject to the arbitral provisions of the RLA.

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[1] Section 301 of the LMRA states that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States." 29 U.S.C. § 185(a) (1982).

III. Plaintiff's Second Claim for Violation of the RLA, § 152, Fourth, Cannot Stand, Because There is No Private Right of Action for an Employee Already Represented by a Collective Bargaining Representative.

Fennessy also attempts to state a claim under section 152, (Fourth) of the RLA, which provides, in pertinent part:

> No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization.

45 U.S.C. § 152 (Fourth). By enactment of this provision, Congress sought to protect employees' rights by ensuring that employees' designation of bargaining representatives would be free from employer coercion or interference. International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 707 (3d Cir. 1982). To further this aim, Congress empowered the National Mediation Board to resolve representational disputes. 45 U.S.C. § 152 (Ninth).

Plaintiff asserts that he can maintain a private right of action under section 152 (Fourth) for his wrongful discharge. However, as defendant aptly points out, section 152 (Fourth) provides only limited rights outside the context of representational disputes. See International Ass'n of Machinists, 673 F.2d at 707. For instance, plaintiff would have had a right against wrongful discharge for his

participation in union organizing campaigns prior to a designation of a representative or to a certification by the mediation board. See, e.g., Burke v. Compania Mexicana De Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970) (a private right of action exists for plaintiff-employee where employee was not a union member because his employee unit was excluded from the certification election). But, section 152 (Fourth) has no relevance once a bargaining representative, such as ROPA here, has been designated, because with a bargaining agreement in place, employees have a viable mechanism (the board of adjustment) through which to dispute their discharges. International Ass'n of Machinists, 673 F.2d at 707, 707 n.6.[2] But see Independent Union of Flight Attendants v. Pan American, 789 F.2d 139, 141-42 (2d Cir. 1985) (the statutorily-created adjustment board procedure might be considered ineffective, and federal judicial intervention is warranted, only where it is clear that the employer's conduct has "been motivated by anti-union animus or . . . an attempt to interfere with its employees' choice of their collective bargaining representative.") (quoting Tello v. Soo Line R.R., 772 F.2d 458, 462 (8th Cir. 1985)) (emphasis added).[3]

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[2] International Ass'n of Machinists involved a claim by a recognized collective bargaining agent that four shop stewards had been discharged or suspended on sham charges because of their employer's anti-union animus. Pursuant to a procedure provided in the collective bargaining agreement, the stewards had brought grievances and had hearings before a board of adjustment. The Third Circuit vacated the district court's finding of jurisdiction and held that the board of adjustment was the sole and proper method for resolving these disputes.

[3] This Court need not analyze plaintiff's claim under the Eighth Circuit's interpretation of section 152 (Fourth) in Tello, 772 F.2d at 462. However, even if Tello applies, it is not clear to this Court that the board of adjustment procedure in which plaintiff participated was ineffective

As plaintiff has had an adequate remedy to dispute his discharge (the board of adjustment hearing), this Court holds that plaintiff's claim under section 152 (Fourth) must fail as a matter of law.

IV. Plaintiff's Complaint Does Not Mention a State Law Claim Which Would Not Be Preempted by the RLA.

In his opposition papers, plaintiff presents, for the first time, a claim that his discharge violated California Labor Code section 923, which states in pertinent part that an employee "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of [union] representatives . . ." As plaintiff's Complaint asserted that "[t]his is an action arising under the Railway Labor Act . . .", and plaintiff made no mention of a state law employment claim, plaintiff has not met the requirements for notice pleading set forth in Fed. Rule Civ. Proc. 8.

In any event, as explained in section II, supra, any claim relating to plaintiff's alleged wrongful discharge is preempted by the RLA. See Edelman, 892 F.2d at 843 (if the basic injury complained of is wrongful discharge, the complaint involves a minor dispute which must be arbitrated in accordance with the RLA).

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due to anti-union animus on the part of Southwest management or ROPA. See International Ass'n of Machinists, 673 F.2d at 712 (plaintiff may not rely on "conclusory allegations" that the employer interfered with the union's representation of its members).

V. Conclusion

It is THEREFORE ORDERED, ADJUDGED, AND DECREED that defendant Southwest's Motion for Summary Judgment is HEREBY GRANTED in its entirety. As plaintiff Fennessy's claims for wrongful discharge and violation of 45 U.S.C. § 152 (Fourth) are "minor disputes" subject to the provisions of the Railway Labor Act, this Court is without jurisdiction to decide them. Furthermore, any state claim plaintiff may proffer is likewise preempted.

**IT IS SO ORDERED.**

/s/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: March 28, 1994

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| PATRICK FENNESSY, | ) | |
| | ) | |
| Plaintiff-Appellant | ) | CA No. 94-55630 |
| | ) | |
| v. | ) | DC No. CV-93-02820-RG |
| | ) | |
| SOUTHWEST AIRLINES, | ) | ORDER* |
| | ) | |
| Defendant-Appellee | ) | |
| | ) | |

BEFORE: FLETCHER, CANBY, and HAWKINS, Circuit Judge

The panel has voted to deny defendant-appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Filed December 6, 1996, Cathy A. Catterson, Clerk, U.S. Court of Appeals.

## Relevant Provisions of the Railway Labor Act

45 U.S.C. § 151a provides in relevant part:

> The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 152, First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, Fourth provides in relevant part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in

> organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees . . . .

45 U.S.C. § 152, Eighth provides in relevant part:

> Every carrier shall notify its employees by printed notices . . . that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

45 U.S.C. § 153, First (q) provides in relevant part:

> If any employee . . . is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee . . . may file in any United States district court . . . a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or

> confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

45 U.S.C. § 184 provides in relevant part:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board . . . .
>
> It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system . . . boards of adjustment under section 153 of this title.

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In The

# Supreme Court of the United States

October Term, 1996

SOUTHWEST AIRLINES CO.,

*Petitioner,*

v.

PATRICK FENNESSY,

*Respondent.*

**On Petition For A Writ Of Certiorari From The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## INTRODUCTION

Petitioner Southwest Airlines Company asks the Court to grant certiorari to decide whether respondent Patrick Fennessy is required to present his claim of retaliation for exercising his rights under the Railway Labor Act ("RLA") to a system board of adjustment before pursuing this claim in court. Because petitioner never made this argument to the Ninth Circuit, and because the Ninth Circuit decision conflicts neither with previous decisions of this Court nor with decisions of other lower courts, the petition for a writ of certiorari should be denied.

## STATEMENT OF THE CASE

### A. FACTUAL BACKGROUND

Petitioner completely omits any discussion about Fennessy's union organizing activities for which he claims he was fired in the petition for a writ of certiorari.

When this case arose, respondent Patrick Fennessy was a good employee working at the airport in Burbank, California, as a ramp agent for petitioner under a collective bargaining agreement ("CBA") between petitioner and the "in-house union", the Ramp, Operations and Provisioning Association ("ROPA"). ROPA was governed by petitioner's management, and its representative were paid by petitioner. A number of employees, including respondent, believed that the employees could improve working conditions and wages if they were represented by a real union. Accordingly, respondent Fennessy

actively campaigned in favor of the Teamsters Union in an organizing campaign; respondent Fennessy was the leader of this campaign at the Burbank California airport. During the campaign, which lasted from March to December 1992, management vigorously supported ROPA against the Teamsters, warning that the Teamsters would ruin respondent's business, and ROPA's leadership warned employees that they would be laid off if they voted for the Teamsters.[1]

Also, during the campaign, in December 1992, respondent had a minor accident at work, and was discharged, purportedly because of the accident. Other employees who had been involved in similar accidents involving equal and even greater damage were not fired, but were only suspended for short periods. The discharge was grieved, and respondent Fennessy was represented in the grievance procedure by one of the ROPA leaders who had threatened employees with economic consequences if they supported the Teamsters. ROPA did not argue in the grievance procedure that Fennessy's discharge was motivated by anti-union animus. Not surprisingly, under the circumstances, the discharge was upheld by a System Board of Adjustment consisting entirely of management and ROPA members.

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[1] The facts are drawn from respondent's evidence in opposition to summary judgment, which must be taken as true because summary judgment was granted against him.

## B. COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE BELOW.

Respondent Fennessy sued petitioner in the United States District Court for the Central District of California, alleging that he had been fired in retaliation for his union activities, in violation of section 152, Fourth of the Railway Labor Act. Petitioner moved for summary judgment arguing that section 152, Fourth, does not provide a cause of action, enforceable in district court, and that, in any event, respondent's claim set forth a "minor" dispute that could be pursued only through the System Board of Adjustment. Respondent Fennessy opposed this motion, arguing that he could bring his claim in district court and that management and his union representative were in collusion against him. The district court, however, dismissed respondent's claim, because it concluded that section 152, Fourth does not create any cause of action for employees who are represented in collective bargaining by a union.

Respondent then appealed to the United States Court of Appeals for the Ninth Circuit. He successfully argued that this Court and the Ninth Circuit have recognized a private right of action under 45 U.S.C. 152, Fourth, emphasizing that the Court will presume such a right "unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992); *see also*, footnote 4, *infra*. Fennessy further showed that, where as in this case, the union and employer are aligned in interest against an individual employee, the grievance procedure is not a reliable substitute for the right to pursue a cause of action in court.

*Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 93, (3rd Cir. 1968). Finally, Fennessy showed the statutory violation did not constitute a "minor dispute". (App. 1.3 – 1.5).

Petitioner did not dispute that a private right of action for violation of 45 U.S.C. 152, Fourth exists. Instead, petitioner argued that although section 152, Fourth creates a cause of action for unrepresented employees it does not create a cause of action for employees represented by a union. For them, petitioner argued, the exclusive jurisdiction for claims of unfair or retaliatory treatment by the employer is before a System Board of Adjustment, and the only represented employees who can sue in court over allegedly improper discharge are those who can show that the union breached its duty of fair representation ("DFR") in the proceedings before the system board. (App. 1.7). Petitioner *never* argued prior to its petition for certiorari that represented employees may seek a judicial remedy for a violation of section 152 Fourth, so long as they submit such claims to the "initial" jurisdiction of the system board.[2]

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[2] Petitioner also *never* argued prior to its petition for certiorari that the rights under section 152, Fourth are incorporated by statute into every CBA, citing 45 U.S.C. 152, Eighth. Petitioner then stretches this argument to assert that statutory violations are therefore preempted by the System Board right of review. However, this directly conflicts with this Court and other courts' findings of a private right of action under section 152, Fourth. *See*, e.g., *Texas & N.O. Railroad v. Brotherhood of R. Steamship Clerks*, 281 U.S. 648, 664-666, 669-670 (1980); *Virginia Railway v. System Federation*, 300 U.S. 575, 543-544 (1987) (dictum); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 939 (9th Cir. 1987).

The court of appeals in this case unanimously reversed. 91 F.3d 1359. It ruled that Fennessy's claim was not a minor dispute, because that term is reserved for claims that the CBA has been violated. (App. 1.5 – 1.6). But respondent was not seeking judicial review of petitioner's compliance with the CBA; his claim arose only under the substantive provisions of the RLA, and as this Court's recent decision in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994) makes clear, statutory claims are not minor disputes. Moreover, the Ninth Circuit observed that many other courts of appeals had routinely recognized a cause of action for violations of section 152, Fourth, and without requiring that the employee first prove breach of the DFR. (App. 1.9 – 1.11). Thus, the district court erred in dismissing respondent's claim under the RLA.

## REASONS FOR DENYING THE WRIT

**The Question Presented Was Not Preserved In Petitioner's Argument to the Court of Appeals, and in Any Case the Ninth Circuit's Decision Is Completely Consistent With Decisions of This Court and Other Lower Courts.**

1. In this Court, petitioner does not contend, as it did in the lower courts, that an employee like respondent who is represented by a union lacks any rights under section 152, Fourth of the RLA, or even that respondent has no cause of action under that section of the RLA. It contends only that respondent should have submitted his claim under that section "initially" to the system board. Thus, the Question Presented is whether the system

board had "exclusive initial jurisdiction" of respondent's claim, and the petition repeatedly refers to the submission to the system board as being only the "first" or "initial" step in the process, subject to "judicial safeguards" or review by the courts. (Pet. at 12, 13).

None of these contentions were advanced in the district court or in the court of appeals, where petitioner argued instead that represented employees like Fennessy have no cause of action under the RLA, and that their sole remedy is before the system board. Nor did either of the lower courts address the argument that is now being advanced by petitioner's new counsel. For this reason alone, the Court should deny certiorari.

2. But even had the argument been advanced, the Court should not grant review to consider it because the Ninth Circuit decision in this case is wholly consistent with previous decisions from this Court. Indeed, the petition rests in large part on the contention that *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), "took too restrictive a view" of the nature of CBAs and the way in which they relate to statutory claims. (Pet. at 5-7). Review is sought, therefore, largely because petitioner wants this Court to overrule its three-year-old ruling in *Norris*.[3]

In addition to finding strong support in *Norris*, as petitioner virtually concedes, the Ninth Circuit decision

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[3] Petitioner is incorrect in arguing that *Norris* decision does not apply. *Norris* is instructive because the Court in *Norris* specifically determined whether court was the appropriate forum for resolving an individual employee's claim of a statutory violation, (although in *Norris*, it was a state whistleblower statute). (App. 1.5).

is also consistent with the line of authority in this Court and the lower courts, which uniformly recognizes a private cause of action in the federal courts to vindicate the rights set forth in section 152, Third and Fourth.[4] And many lower courts have extended this right beyond employees who have no union representation to *include* employees who are *already represented* by unions and covered by CBAs.[5] Petitioner has not cited a single decision from the lower courts that allegedly conflicts with the court of appeals' decision of which it seeks review; the only lower court decisions cited are in accord with the Ninth Circuit decision. (Pet. at 8, 11).

Instead, petitioner raises an argument clearly rejected by the Ninth Circuit in their decision in this case, and argued by Fennessy in his Appeal Brief to the Ninth Circuit. Petitioner argues that the RLA gives System Boards of Adjustment broader jurisdiction over claims, to

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[4] *E.g., Texas & N.O. R. v. Brotherhood of Ry. & Steamship Clerks,* 281 U.S. 548, 567, 569-570 (1930); *Virginia Ry. Co. v. System Fed'n,* 300 U.S. 515, 543-544 (1937); *Stepanischen v. Merchants Dispatch Transp. Corp.,* 722 F.2d 922, 927 (1st Cir. 1983); *Adams v. Federal Express,* 654 F.2d 454 (6th Cir. 1981), *aff'g,* 470 F. Supp. 1356 (W.D. Tenn. 1979); *Brotherhood of RR Trainmen v. Central of Georgia Ry. Co.* 305 F.2d 605, 608-609 (5th Cir. 1962). The Ninth circuit noted that in *Stepanischen,* the court acknowledged that "every court that had considered the question had found an implied right of action under section 152, Fourth. *Stepanischen* at 924.

[5] *Roscello v. Southwest Airlines,* 726 F.2d 217, 219-220 and n.2 (5th Cir. 1987); *Conrad v. Delta Air Lines,* 494 F.2d 914, 918 (7th Cir. 1974); *Brady v. TWA,* 401 F.2d 87, 95-96, 100-103 (3d Cir. 1968).

include violation of section 152, Fourth. Petitioner inaccurately states, without support, that "an RLA CBA broadly provides for the submission of all discharge cases to the statutory mandated adjustment board." (Pet. at 6). However, this Court and lower courts have consistently upheld the individual right to file a district court action for violation of section 152, Fourth. *See,* footnote 4, *supra*). The reality is that if an employee were required to submit his claim for violation of section 152, Fourth to a system board of adjustment, he would have virtually no chance to receive a fair hearing on it. (*See, Brady, supra,* 401 at 93). In *Brady, supra,* the Third Circuit was presented with a post-certification cause of action for violation of 45 U.S.C. section 152, Fourth. In finding that federal court jurisdiction was warranted where the existing Board of Adjustment was incapable of rendering a fair disposition of the grievances in issue, the court stated that:

> There is good reason to deny the jurisdictional authority of adjustment boards in so far as controversies between employees and their bargaining representatives are concerned. The membership of such boards is designed to give representation to management and to the union. Normally, the [systems] board's composition would present no problem since its express statutory authority is to hear grievances between employees and their employers arising out of the collective-bargaining agreement. In such a dispute the employee would expect his union, acting under its duty to prosecute fairly the grievances of its members, to represent him before the board. . . . [i]t is simply repugnant to our standards of fundamental fairness and

> totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining agent. *Brady*, 401 F.2d at 93.

Nor would judicial review pose as any real safeguard to the process since, as the Ninth Circuit pointed out, "[j]udicial review of the Adjustment Board's decision of [] a minor dispute is 'among the narrowest known to the law.' " [citation omitted.] Rather, only minor disputes are submitted to Adjustment Boards. *Atchison Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 552, 562-563 (1987). Petitioner also attempts, without any support, to analogize the systems board of adjustment to an experienced labor arbitrator. Fennessy need not address these arguments here because petitioner failed to overcome its first hurdle, which is to show that Fennessy did not have a private right of action based on past decisions that have recognized such a right. (*See*, footnote 4).

Petitioner cites *TWA v. IFFA*, 489 U.S. 426 (1989), which conflicts with the circuit court decision below because the Court there characterized section 152, Fourth as "addressing primarily the pre-certification rights and freedoms of unorganized employees." But *TWA* is inapposite and does not aid petitioner's quest for review.

In *TWA*, the question was whether an airline had violated RLA when it refused to displace flight attendants whose jobs had been occupied by replacements during a strike. There was no issue in *TWA* about whether claims should be pursued in district court as opposed to a system board of adjustment; the issue was only whether the RLA had been violated. Nor was there

an issue of union organizing at all – the question was the rights of employees represented by a union that had called a strike and been defeated economically during the period of self-help after the RLA's procedures had been exhausted. In that context, the Court stated that section 152, Fourth was addressed "primarily" to pre-certification issues, and did not provide support for the union's claim.

Here, by contrast, Fennessy was fired in the course of a rival union organizing campaign, which is precisely the "pre-certification" context at which this Court said section 152, Fourth was "primarily" addressed. This is, indeed, the context in which a number of other courts have upheld the right of action under section 152, Fourth, including *Roscello*, the Fifth Circuit case, cited in footnote 5, that involved this petitioner. Nor did the Court even begin to address in *TWA* the circumstances, other than the "primary" focus of the statute, in which section 152, Fourth could be applied to non-certification controversies. There is, therefore, no conflict between *TWA* and the decision below, and no reason to grant review in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SOUTHWEST AIRLINES CO.,
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PATRICK FENNESSY,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

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## BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

---

The National Railway Labor Conference (NRLC) and the Airline Industrial Relations Conference (AIRCON) respectfully submit this brief as *amici curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

### INTEREST OF THE *AMICI CURIAE*

The National Railway Labor Conference (NRLC) is an unincorporated association whose members comprise most of the nation's class I railroads. The NRLC represents member railroads in collective bargaining under the Railway Labor Act, on legislative matters affecting labor-management relations in the railroad industry, and in

administrative or judicial proceedings involving labor issues of general concern to member railroads. Its members transport over 90 percent of the nation's freight that moves by rail.

The Airline Industrial Relations Conference (AIRCON) is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member carriers in those areas with respect to legislative, judicial and administrative matters. Its members include most major and national scheduled air carriers in the United States.

## SUMMARY OF ARGUMENT

There are two "compelling reasons" under Supreme Court Rule 10 for granting certiorari in this case. First, the decision of several United States Courts of Appeals squarely conflict on the important federal question of whether, and under what circumstances, a federal court has jurisdiction over a union-represented employee's claim that his termination violates § 2, Fourth of the Railway Labor Act (RLA), 45 U.S.C. § 152, Fourth.[1] The Ninth Circuit stands alone in its recognition of such actions without limitation. The Third, Fifth and Seventh Circuits have recognized them only where the plaintiff's union is unable or unwilling to process a grievance on his behalf. The Second and Eighth Circuits have held that § 2, Fourth does not grant represented employees any implied right of action at all. The Court should resolve this conflict in order to foster uniformity in an important arena of labor-management relations in the railroad and airline industries.

Second, the Ninth Circuit's decision in the instant case squarely conflicts with *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. The Ninth Circuit found a private right of action under § 2, Fourth, without considering Congress' intent in enacting that provision. Application of the proper standard, in light of relevant Supreme Court prece-

[1] Unless otherwise specified, all statutory citations are to the RLA.

dent construing the RLA, compels a finding that the district court did not have jurisdiction over Fennessy's § 2, Fourth claim against Southwest.

## ARGUMENT

### I. THE DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEALS SQUARELY CONFLICT ON THE IMPORTANT FEDERAL QUESTION OF WHETHER, AND UNDER WHAT CIRCUMSTANCES, FEDERAL COURTS HAVE JURISDICTION OVER A UNION-REPRESENTED EMPLOYEE'S CLAIM THAT HIS TERMINATION VIOLATES § 2, FOURTH OF THE RAILWAY LABOR ACT.

Section 2, Fourth guarantees to employees "the right to organize and bargain collectively through representatives of their choosing," and provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter." The section also prohibits carriers and their agents from

> deny[ing] or in any way question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice . . . [or] interfer[ing] in any way with the organization of its employees . . . [or] influenc[ing] or coerc[ing] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . .

Courts construing the provision have taken mutually inconsistent positions with respect to whether, and under what circumstances, § 2, Fourth confers jurisdiction on federal courts to hear the discriminatory discharge claims of employees represented by unions.[2] In *Fennessy v.*

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[2] United States Courts of Appeals generally agree that federal courts have jurisdiction under § 2, Fourth to hear *unrepresented* employees' claims that they were discharged for engaging in union organizing activity. *See Stepanischen v. Merchants Dispatch Transportation Corp.*, 722 F.2d 922, 927 (1st Cir. 1983); *Robinson v. Pan American World Airways, Inc.*, 777 F.2d 84 (2d Cir. 1985); *Adams*

*Southwest Airlines Co.*, 91 F.3d 1359 (9th Cir. 1996), the Ninth Circuit took the unique position that federal courts have jurisdiction over such claims without limitation. Other courts are divided, holding either that federal courts: (1) have jurisdiction over such claims only when the plaintiff either does not have recourse to an adjustment board, or such recourse is meaningless in light of a union's breach of its duty of fair representation;[8] or (2) lack jurisdiction over such claims under any circumstances.

It is not surprising that the Ninth Circuit stands alone in its expansive construction of § 2, Fourth's applicability to represented employees. As discussed in Part II, *infra* at 13-19, Congress' intent, as reflected in the structure and legislative history of the RLA up to the 1934 amendments, is incompatible with the Ninth Circuit's interpretation. Indeed, this Court recently emphasized that § 2, Fourth "address[ed] primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 440 (1989). The Ninth Circuit, on the other hand, did not even consider Congressional intent when it held that Fennessy had an implied private right of action under § 2, Fourth.

**A. The Ninth Circuit Standard**

The Ninth Circuit has adopted the most liberal interpretation of Section 2, Fourth. According to the *Fennessy* court, federal courts have § 2, Fourth jurisdiction over discriminatory discharge claims brought by individual employees, irrespective of whether the employee has ac-

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*v. Federal Express*, 547 F.2d 319, 321 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977); *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 663 n.1 (7th Cir. 1996); *Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031, 1033 (9th Cir. 1970). The validity of those decsions is not challenged by Southwest's petition.

[8] Fennessy obtained the assistance of his union, and the grievance over his discharge was heard by a Systems Board of Adjustment. Fennessy did not raise a timely claim that his union breached its duty of fair representation in connection with his discharge.

cess to an adjustment board or whether a union breached its duty of fair representation in connection with the claim. 91 F.3d at 1364.

### B. The Standard of the Third, Fifth and Seventh Circuits

The Third, Fifth and Seventh Circuits have recognized such a private right of action only under circumstances where the represented employee's union could not, or would not, process a grievance over the discharge. *See Brady v. Trans World Airlines Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert. denied, sub nom. IAM v. Brady* and *Trans World Airlines v. Brady*, 393 U.S. 1048 (1969); *Roscello v. Southwest Airlines Co.*, 726 F.2d 217 (5th Cir. 1984); *Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914 (7th Cir. 1974).

#### 1. *The Third Circuit Standard*

In *Brady*, the plaintiff sued his employer for wrongful discharge, and his union for breach of its duty of fair representation. The plaintiff alleged that the union subjected him to a discriminatory dues obligation, and then, based on his alleged failure to pay dues, unfairly certified him as not in compliance with the union security provision of the applicable collective bargaining agreement. The employer terminated Brady upon receiving the certification. 401 F.2d at 90-91.

Following well settled Supreme Court precedent, the Third Circuit found district court jurisdiction to hear the employee's claim against his union for breach of its duty of fair representation. *Id.* at 93. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) (holding employees have implied right of action under § 2, Third and Fourth to sue their union for breach of its duty of fair representation). In analyzing jurisdiction over the employer, the Court first observed that "plaintiff's controversy is primarily with his bargaining agent rather than his employer." *Brady*, 401 F.2d at 92. Nonetheless, the Court determined that the claim against the employer could go forward, reasoning:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."

*Id.* at 94-95, *quoting Cunningham v. Erie Railroad*, 266 F.2d 411, 416 (2d Cir. 1959). Thus, the court viewed its jurisdiction over the employer as flowing from its jurisdiction over the union. The Third Circuit's subsequent rejection of a *union's* § 2, Fourth claim highlights this distinction. *See International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc.*, 673 F.2d 700, 708 (3rd Cir. 1982) (observing that *Brady* "has little relevance to" claims "which involve disputes between a carrier and its employees.").

*Northwest Airlines* confirms the Third Circuit's restrictive view of the scope of a § 2, Fourth private right of action. There, the Court held that a federal district court lacked jurisdiction to hear a union's claim that numerous employer actions constituted an unlawful pattern of interference, harassment, and coercion in violation of § 2, Fourth. 673 F.2d at 703. In so finding, the Court distinguished cases in other circuits where *unrepresented* employees were held to have a private right of action under § 2, Fourth. The court reasoned:

> In these pre-certification cases, the employees could not grieve their discharges, because no bargaining representative had been designated or certified. As a result no collective bargaining agreement was in existence and no employees' dispute could be submitted to a Board of Adjustment because a Board had not been created.

*Id.* at 707.

The Court expressly *rejected* the district court's conclusion that "these cases, all of which involved pre-certification disputes, could be expanded to reach employer anti-union conduct after the employees had already designated a bargaining representative." *Id.* at 707 n.6. Rather, it held that "the language of Section 2 does no more than pro-

scribe interference or coercion that takes place *prior* to employee designation of a bargaining representative. Thus, Section 2, by its express terms, has no relevance to post-designation conduct." *Id.* (emphasis in original).

Despite this language, the Court did "not foreclose the possibility that given the appropriate case and the appropriate circumstances" a federal court could hear a *union's* claim that disciplinary measures taken by an employer were motivated by anti-union animus. *Id.* at 709. However, in outlining the jurisdictional predicate to such an action, the court again highlighted its narrow view of the scope of private rights of action implicit in § 2, Fourth; a union could not establish jurisdiction under § 2, Fourth without alleging "that the defendant is engaged in a general campaign or effort designed to destroy or undermine the union's representation of its members." 673 F.2d at 711.

***2. The Fifth Circuit Standard***

In *Roscello,* the plaintiff was discharged after the carrier recognized a union as representing his craft or class, but prior to a collective bargaining agreement between the new representative and the carrier. 726 F.2d at 219. After the company denied the plaintiff's grievance at the first step, he did not have the right to proceed to an adjustment board because the company "refused to discuss any more grievances with the [employee's union representative] in the absence of a collective bargaining contract." *Id.* The parties did "not question whether the plaintiff has a private right of action for wrongful discharge under the Railway Labor Act," and the Court expressly declined to decide the issue. *Id.* at 220 n.2.

A Fifth Circuit opinion predating *Roscello* suggests that the Court would have taken a more restrictive view of the employee's rights had he been represented by a union willing and able to process his grievance. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 305 F.2d 605 (5th Cir. 1962), involved claims by both a union and an individual employee serving as a union agent that the carrier violated § 2, Third. The

carrier allegedly had threatened to discharge the employee for carrying out his representational duties, in order to influence and coerce the Trainmen craft or class in the choice or designation of their bargaining representative. 305 F.2d at 607. The court found that the *union* stated a cause of action, explaining:

> The purpose of the disciplinary hearing leading to a predetermined purpose to discharge [the employee/union agent] is to discredit him as well as the Brotherhood as bargaining representatives. The Railway Labor Act is equally broad. And certainly it is not so narrow that while it is at pains to secure an untrammeled *choice* of bargaining representative, a carrier would nevertheless be free to frustrate and undermine the effectiveness of such bargaining agent by securing his discharge for unfounded, false or baseless charges.
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> • • • •
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> If this is really the objective of the Railroad's plan, it is obviously a violation of the Railway Labor Act. As such, the Courts are open to grant appropriate injunctive relief.

305 F.2d at 608-09 (emphasis in original).

Despite this holding that the carrier's pretextual discharge of a bargaining agent constituted an actionable violation of the RLA, the court held that the *employee* had no "recourse to a court injunction to prevent the railroad from violating *his* rights simply as an employee . . ." 305 F.2d at 607 (emphasis in original). Thus, the court implicitly recognized that once employees are represented by a union, they must look to the union to ensure that the employer respects their representational rights, even when violation of those rights takes the form of adverse employment action against particular employees.

### 3. *The Seventh Circuit Standard*

*Conrad*, like *Brady*, was a hybrid duty of fair representation action against the union and a discriminatory discharge action against the employer. In addition, the employee, because of his probationary status, did not have

access to the Systems Board of Adjustment to challenge his discharge. As in *Roscello*, the court's jurisdiction was not disputed. 494 F.2d at 918.

### C. The Standard in the Second and Eighth Circuits

At the other extreme, both the Second and Eighth Circuits have unequivocally held that Congress did not intend to give represented employees a right to sue for wrongful discharge in violation of the RLA. *Stack v. New York Central Railroad Co.*, 258 F.2d 739, 741 (2nd Cir. 1958) ("[T]he failure of Congress to spell out such a federal right of action should be taken to mean that no such right was intended."); *Smithey v. St. Louis Southwestern Railway Co.*, 237 F.2d 637, 638 (8th Cir. 1956) ("The right of a railroad employee to damages for a discharge, whether related to a labor agreement or otherwise, is a matter that has been left entirely to state contractual concept and remedy. . . . In other words, a railroad employee cannot claim damages for any discharge, except as the discharge constitutes an actionable one under the law of the applicable state.").[4]

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[4] The First Circuit also has never held that a federal court has jurisdiction to hear an employee's § 2, Fourth claim. Moreover, in the only case in which it addressed the issue, the Court held that it was "especially convinced of [its] obligation to deny federal court jurisdiction on the facts herein" in light of this Court's "pronouncement in *TWA v. IFFA* that the post-certification rights of unions under Section 2 Third and Fourth are narrowly circumscribed." *National Railroad Passenger Corp. v. International Association of Machinists and Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990). It further distinguished the plaintiff's allegations from an earlier case in which it recognized a *union's* right to sue under § 2, Fourth, based on "extraordinary union animus" demonstrated by the employer's having selectively abolished the jobs of 472 represented employees who had engaged in a lawful strike. 915 F.2d at 53 (discussing *Railway Labor Executives' Association v. Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987)). These cases suggest that the First Circuit would not recognize a cause of action under the circumstances of Fennessy's case.

### D. Summary

The importance of the Court's resolving this conflict among the Courts of Appeals cannot be overstated. It is well settled that uniformity is essential in the arena of labor management relations. *See Burnett v. Gratton*, 104 S.Ct. 2924, 2931 n.14 (1984) (noting the "importance of uniformity in the labor law field"). This is particularly true with respect to the RLA, under which groups of employees working for interstate carriers and spread throughout the United States, routinely share a single bargaining representative. *See, e.g., Robinson*, 777 F.2d at 88. Employees represented by the same bargaining agent and working for the same employer should not have different rights of access to federal courts depending upon the federal judicial circuit in which they happen to be able to file an action most conveniently. Fennessy prevailed in the Ninth Circuit; he would have failed in the Second, Third, Fifth, Seventh and Eighth Circuits.

## II. THE NINTH CIRCUIT IGNORED THIS COURT'S CONTROLLING PRECEDENT WHEN IT FAILED TO EXAMINE WHETHER CONGRESS INTENDED § 2, FOURTH TO CONFER A PRIVATE RIGHT OF ACTION ON REPRESENTED EMPLOYEES

### A. The *Cort v. Ash* Principle

Relying upon its decisions in *Burke*, *supra* note 2, and *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935 (9th Cir. 1987), the *Fennessy* court held that § 2, Fourth created a private right of action for represented employees, without considering Congress' intent in enacting the provision. *See* 91 F.3d at 1364 n.2.

In *Burke*, the Ninth Circuit had held that an *unrepresented* employee had a private right of action under § 2, Fourth, reasoning that "[i]n the absence of a clear congressional intent to the contrary, the courts are free to fashion appropriate civil remedies based on the violation of a penal statute where necessary to ensure the full effectiveness of the congressional purpose." 433 F.2d at 1033.

The *Arcamuzi* court merely followed *Burke*, without undertaking any independent analysis. 819 F.2d at 936.[5]

The standard applied in *Burke* was overruled in *Cort v. Ash*, 422 U.S. 66 (1975), in favor of one requiring an examination of congressional intent. Moreover, since *Cort*, this Court has repeatedly emphasized the centrality of congressional intent in deciding whether the proscriptions of federal statutes give rise to private rights of action. Application of the proper standard, in light of relevant Supreme Court precedent construing the RLA, compels a finding that the district court did not have jurisdiction over Fennessy's § 2, Fourth claim against Southwest.

This Court recently articulated the standard applicable to determining whether to infer a private right of action from a federal statute:

> [O]ur focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash*, along with other tools of statutory construction. . . . Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."

*Thomson v. Thomson*, 484 U.S. 174, 179 (1987) (citations omitted), *quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), *and Northwest Airlines, Inc. v. Transport Workers of America, AFL-CIO*, 451 U.S. 77, 79 (1981).

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[5] Moreover, in *Arcamuzi*, although the plaintiffs—returning strikers who objected to taking polygraph exams—were represented by a union, the employer had withdrawn its recognition of the union prior to the strikers' return. As a result, the *Arcamuzi* plaintiffs would not have had access to a Systems Board of Adjustment, and were, for practical purposes, unrepresented. *See Airline Pilots v. O'Neill*, 499 U.S. 65, 68 (1991).

The four factors set out in *Cort* are: (1) whether the plaintiff is one of the class for whose "especial benefit" the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States. *See Cort*, 422 U.S. at 78. *See also Northwest Airlines*, 451 U.S. at 91 ("Factors relevant to this inquiry [into whether Congress intended to create a private remedy] are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.")

In recent years, this Court has held that the four factors articulated in *Cort* are not to be given equal weight in determining whether Congress intended to create a private right of action. In particular, the Court has emphasized the preeminence of the structure and purpose of the legislative scheme allegedly creating the right of action.[6]

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[6] *See, e.g., Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 145 (1985) (refusing to imply private remedy under Employee Retirement Income Security Act, even though plaintiff was a member of the class for whose benefit the statute was enacted and the action would not have encroached on state law, because "legislative intent and consistency with the legislative scheme—point in the opposite direction"); *Transamerica Mortgage Advisors*, 444 U.S. at 24 ("Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf.").

### B. Application of *Cort* to Section 2, Fourth

Although § 2, Fourth was clearly intended to protect unrepresented employees, the structure, purpose and legislative history of the RLA conclusively establish that Congress did not intend § 2, Fourth to create a private right of action in favor of represented employees.

#### 1. *The Language of the 1934 Amendments*

The analysis of congressional intent "must begin with the language of the statute itself." *Touche Ross & Co. v. Redington, Trustee,* 42 U.S. 560, 568 (1979). Section 2, Fourth guarantees to employees "the right to organize and bargain collectively through representatives of their choosing" and provides that the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter." The section also prohibits carriers and their agents from

> deny[ing] or in any way question[ing] the right of its employees to join, organize, or assist in organizing the labor organization of their choice . . . [or] interfer[ing] in any way with the organization of its employees . . . [or] influenc[ing] or coerc[ing] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . .

Section 2, Ninth creates a mechanism whereby the majority of employees may designate their choice of a bargaining representative. The National Mediation Board is responsible for administering that mechanism, and for ensuring that representatives are chosen "in such a manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." These are the very same rights crated by § 2, Fourth, and this Court has recognized that § 2, Ninth was intended to "protect[]" the § 2, Fourth right of employees to determine their representative free from carrier interference, influence or coercion. *Switch-*

*men's Union of North America v. National Mediation Board*, 320 U.S. 297, 300 (1943). As the *Switchmen's* Court explained:

> The Act in § 2, Fourth writes into law the "right" of the "majority of any craft or craft of employees" to "determine who shall be the representative of the craft or class for the purposes of the Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it . . .

320 U.S. at 300-01.

In addition, the 1934 amendments to the RLA also empowered the Attorney General of the United States to seek criminal sanctions against employers who violate § 2, Fourth. *See* § 2, Tenth. These criminal sanctions include fines of up to $20,000 for each day of violation. Section 2, Tenth has rarely been invoked. *See Robinson*, 777 F.2d at 86. However, at the time the 1934 amendments were passed, Congress could not have known that. Indeed, Congress could reasonably have concluded that the mere threat of fines of $20,000 a day—a huge amount of money during the depth of the Great Depression—would be sufficient to ensure compliance with § 2, Fourth.

Congress' provision for alternate means of enforcing § 2, Fourth is strong evidence of its intent not to permit private rights of action under the clause. For

> [i]t is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. In such cases, "in the absence of strong indicia of contrary congressional intent, [courts] are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

*Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 533 (1989) (citations omitted), *quoting, Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 15 (1981).

Moreover, the presumption is particularly strong under the RLA, where Congress has created a "comprehensive framework for the resolution of labor disputes in the railroad industry . . . [through] elaborate administrative procedures for the resolution of both major and minor labor disputes." *Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557, 562 (1987). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines,* 451 U.S. at 97. As this Court held in *Switchmen's*:

> Congress for reasons of its own decided upon the method for the protection of the 'right' which it created [under § 2, Fourth]. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another.

301 U.S. at 301.

### 2. *The Legislative History of the RLA*

The legislative history of the Act through the 1934 amendments also indicates that Congress would not have created a federal right of action under § 2, Fourth without expressly so stating. The 1934 amendments represented one additional step in the Act's history of a piecemeal expansion of the jurisdiction of federal courts and arbitrators to resolve disputes between carriers and their employees.

Congress first addressed the problem of union-management relations in the railroad industry through the Transportation Act of February 28, 1920. As explained in *Virginia Ry. Co. v. System Federation No. 40,* 300 U.S. 515 (1937), the Transportation Act "set up the Railroad Labor Board as a means for peaceful settlement, by agreement or by arbitration, of labor controversies

between interstate carriers and their employees." 300 U.S. at 542. However, the decisions of the Board were supported by no legal sanctions, and as a result its authority was generally not recognized or respected by the railroads or their employees. *Id.*

Congress sought to address the perceived weakness of the Transportation Act by enacting the Railway Labor Act of 1926. As explained by the *Virginia Railway Co.* Court:

> By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes.

300 U.S. at 542-43.

After passage of the RLA, the enforceability of arbitration awards facilitated the resolution of disputes between carriers and their employees under circumstances where "there was no dispute as to the organizations authorized to represent the employees." *Id.* at 545. However, it also became clear that those circumstances were often not present because of "the maintenance by the railroads of company unions and the denial of railway management of the authority of representatives chosen by their employees." *Id.* at 545-46, *citing* Report of House Committee on Interstate and Foreign Commerce, No. 1944, 73rd Cong., 2nd Sess., at 1-2 (1934).

As a result, the 1934 amendments, including § 2, Fourth, were principally intended to address the problem of railroads interfering with employee efforts to choose their representatives. As this Court recently explained:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, we have viewed them as address-

> ing primarily the precertification rights and freedoms of unorganized employees.
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> The explanation for the precertification focus of the 1934 amendments is clear. The RLA provides an exhaustively detailed procedural framework "to facilitate the voluntary settlement of major disputes." The effectiveness of these private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer and on the subsequent assurance that neither party will be able to enlist the courts to further its own partisan ends.

*Trans World Airlines, Inc.*, 489 U.S. at 440-41 (citations omitted), *quoting Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 378 (1969). *See also Virginia Railway Co.*, 300 U.S. at 546 ("Section 2, Ninth, of the amended act (45 U.S.C.A. § 152, subd. 9) was specifically aimed at this practice [of railroads maintaining company unions]. It provided a means for ascertaining who are the authorized representatives of the employees . . .").

Moreover, this Court has long recognized that Congress' focused and piecemeal expansion of judicial and administrative jurisdiction under the RLA evidences its intent to confer such jurisdiction only to the extent expressly set forth in the Act:

> Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforceable commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain in the realm of conciliation, mediation and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. . . . Congress intended to go

> no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

*Switchmen's*, 320 U.S. at 302.

In stark contrast to the historical evidence of Congress' intent to protect the rights of unrepresented employees through § 2, Fourth, there is no basis in the history of the 1934 amendments to impute to Congress an intent to permit individual employees to pursue claims against their employer after the certification of a bargaining representative. The System Boards of Adjustment required to be established by Title II of the RLA serve that purpose.[7]

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[7] A represented employee's claim that he was terminated in violation of § 2, Fourth would be within the jurisdiction of an adjustment board. This Court recently reaffirmed that claims which may be conclusively resolved by interpreting an applicable collective bargaining agreement are "minor disputes" subject to adjustment board jurisdiction. *Hawaiian Airlines, Inc. v. Norris*, 114 S.Ct. 2239, ——, 129 L.Ed. 2d 203, 213 (1994).

In *Norris*, the Court held that an employee's state law wrongful discharge claim was independent of the applicable collective bargaining agreement, because its resolution under Hawaii law required "only the purely factual question into *any* retaliatory motive of the employer." 129 L.Ed. at 220. By contrast, courts that have permitted *§ 2, Fourth claims* to go forward have analyzed their merits under the burden shifting analysis used by the National Labor Relations Board to adjudicate alleged violations of 29 U.S.C. § 158(a)(3). *See, e.g., Lebow*, 86 F.3d at 665-66. Under that analysis, an employment action that is motivated by *any* anti-union animus is not unlawful, provided the employer would have taken the same action irrespective of the unlawful motive. *Id.*

Unlike a claim satisfied by a showing of *any* unlawful motive, a claim under the § 2, Fourth burden shifting analysis would be dependent on the collective bargaining agreement. By definition, an employee who has been terminated for "just cause"—or, as was found by the Adjustment Board hearing Fennessy's grievance, "proper cause"—could not show that he would not have been terminated *but for* his union activities.

Moreover, arbitrators routinely consider an employer's past history of disciplinary rule enforcement in determining whether particular discipline is appropriate under the terms of a collective

Other purposes of the RLA woud *not* be served by recognizing Fennessy's claim. Permitting represented employees to prevent the swift adjudication of their employment grievances by opting for the slow processes of the federal courts is not compatible with the RLA's purpose of "providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements . . . [and] secur[ing] the prompt, orderly and final settlement of grievances." *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978).

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bargaining agreement. Any discharge which discriminated against an employee by being inconsistent with the employer's past treatment of similarly situated employees would not be for cause. *See, e.g., King Scoopers Inc. and Food & Commercial Workers, Local 7*, 101 L.A. 107 (1993) (holding discharge of employee was without cause where it was for violation of work rule that had been inconsistently enforced in the past); *TRW Inc. and Auto Workers, Local 2400*, 102 LA 348 (1994) (overturning three day suspension for one-day absence because penalty was inconsistent with past practice). As a result, there need be no concern that a carrier could successfully enforce a discharge which, although permissible under the letter of an agreement, was in fact pretextual.

## CONCLUSION

The Court should grant certiorari to resolve the conflict among United States Courts of Appeals concerning the important question of whether represented employees have an implied private right of action under § 2, Fourth of the RLA. Until the conflict is resolved, employees of the same carrier will, for practical purposes, have divergent procedural rights to redress perceived violations of § 2, Fourth, depending upon the fortuity of their geographic location. In addition, the Court should act to ensure that congressional intent, and not a single court's view of what is salutary, shall govern the scope of remedies permissible under the RLA.

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IN THE

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On Petition for Writ of Certiorari from the
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# PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

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## *Preliminary Statement*

In his brief in opposition, Fennessy argues that the issue presented for review may not be considered by this Court, because Southwest "never made this argument to the Ninth Circuit." (Brief in Opposition, p. 1.)

The question presented for review in Southwest's original petition is: "Whether a Railway Labor Act system board of adjustment has exclusive initial jurisdiction of an employee's claim of wrongful discharge in violation of section 152, Fourth of the RLA." (Petition, p. i.)

*Issue Presented for Review Was Decided by the Ninth Circuit*

In its opinion, the Ninth Circuit resolved two issues contrary to Southwest's position: (1) Fennessy's statutory claim is not a "minor" dispute within the exclusive jurisdiction of the system board of adjustment. (2) Fennessy has a private right of action to enforce his RLA claim directly in federal court without submitting it to the system board of adjustment. (App. 1.5-1.11.)

Clearly, the Ninth Circuit passed on the issue presented for review in this Court, *i.e.* did the system board of adjustment have exclusive initial jurisdiction[1] of Fennessy's statutory claim? It is not necessary that the issue be framed precisely as it was in the court below. "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed

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[1] The term "initial" is used in recognition of the fact that the district court has jurisdiction to review the system board decision under a variety of circumstances. For example, judicial review is available under the statute, 45 U.S.C. § 153, First (q). By way of further example, judicial review is also available where there has been a material breach of the duty of fair representation. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976). Of course, "initial" jurisdiction in federal court may be premised upon a material breach of the duty of fair representation. *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324, 89 S. Ct. 548 (1969). In this latter instance, however, initial jurisdiction will lie in federal court because the board of adjustment is without jurisdiction to entertain a dispute between an employee and his union. *Id.*, 393 U.S. at 328-29, 89 S. Ct. 550-51. *See also Conley v. Gibson*, 355 U.S. 41, 44, 78 S. Ct. 99, 101 (1957). In such a circumstance, the employer may be "made a party to insure complete and meaningful relief . . . ." *Glover*, 393 U.S. at 329, 89 S. Ct. at 551.

below." *Yee v. City of Escondido*, 503 U.S. 519, ___, 112 S. Ct. 1522, 1532 (1992). "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, 'in a state of evolving definition and uncertainty,' and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8, 111 S. Ct. 2749, 2761 n.8 (1991) (citations omitted).

*New Argument*

Southwest concedes that it is making a new argument in this Court in support of its consistent position that Fennessy's statutory claim should have been submitted in the first instance to the system board of adjustment. More particularly, Southwest argues for the first time in this Court that when determining whether a statutory claim should be submitted to an arbitral tribunal, the statutory right should be carefully examined to determine whether "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354-55 (1985). While conducting this analysis, the Court should bear in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). The burden should be on Fennessy "to show that Congress intended to preclude a waiver of a judicial forum" for his statutory claim. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). By requiring Fennessy to first submit his statutory claim to the adjustment board, he "does not forego the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a

judicial forum." *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354.

This new argument may be properly considered by the Court. For where the underlying issue has been decided by the court of appeals, a party is not limited to the precise arguments it may have made below. "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, ___, 115 S. Ct. 961, 965 (1995), quoting *Yee*, 112 S. Ct. at 1532. *See also Dewey v. Des Moines*, 173 U.S. 193, 198, 19 S. Ct. 379, 380 (1899).

To reiterate, Southwest's argument that Fennessy's statutory claim should be analyzed under the *Mitsubishi/Moses H. Cone/Gilmer* paradigm is not a new claim. Rather, it is simply a new argument to support what has been Southwest's consistent position throughout, *i.e.* Fennessy's statutory claim should have been initially submitted to the statutory/contractual system board of adjustment.

*Conclusion*

The Ninth Circuit decided (1) that Fennessy's claim was not a "minor" dispute within the exclusive jurisdiction of the system board of adjustment; and (2) that Fennessy could bypass the adjustment board because he had a private right of action which he could bring directly in federal court. It is obvious that the Ninth Circuit ruled on the issue presented for review in this Court, *i.e.* did the adjustment board have exclusive initial jurisdiction of Fennessy's statutory claim? Southwest's new argument to this Court

that analysis of the issue should include the principles enunciated in *Mitsubishi*, *Moses H. Cone* and *Gilmer* is *not* a new claim. Rather, it is merely "a new argument to support what has been [Southwest's] consistent claim." *Lebron*, 115 S. Ct. at 965.

Respectfully submitted,

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